JOREMI KIMIN & ANOR

v.

TAN SAI HONG

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
21 DECEMBER 2000

CIVIL LAW ACT: *Dependency claim - Loss of support - Whether claimant the wife of deceased - Civil Law Act 1956, s. 7(2) - Non-registration of customary marriage - Whether dependency claim affected - Law Reform (Marriage and Divorce) Act 1976, ss. 22(4), 24, 34*

DAMAGES: *Fatal accident - Dependency claim - Loss of support - Whether claimant the wife of deceased - Civil Law Act 1956, s. 7(2) - Non-registration of customary marriage - Whether dependency claim affected - Law Reform (Marriage and Divorce) Act 1976, ss. 22(4), 24, 34*

CIVIL PROCEDURE: *Appeal - Apportionment of liability - Quantum of damages - Interference by appellate court - Whether warranted - Factual findings of trial judge*

The appellants appealed against the damages awarded to the respondent due to a motor accident that caused the death of the respondent's husband. They raised the issue of whether the respondent was the deceased's 'wife' under the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), and if so, whether she had the legal right to claim damages as a dependant of the deceased.

The respondent and the deceased had had a customary marriage contracted in Singapore, which was neither registered in Singapore nor in Malaysia under s. 22(4) of the Act. Therefore, the appellants contended that since the marriage was not in accordance with the provisions of the Act, it was not valid. However, the principal issue was whether the respondent would fulfil the definition of the term 'wife' under s. 7(2) of the Civil Law Act 1956.

The appellants also submitted that liability for the accident should be equally apportioned. They submitted that certain evidential issues had been decided wrongly by the judge.

Held:
Per Haidar Mohd Noor JCA

[1] Relying on s. 34 of the Act, the customary marriage between the respondent and the deceased was valid, as registration was merely a formality. The true intention of the Act is to provide for a monogamous marriage, which was precisely how the marriage was.

[2] The respondent was the wife of the deceased within the meaning of s. 7(2) of the Civil Law Act 1965, and was therefore entitled to claim for loss of dependency.

[3] On the issues of apportionment and quantum of liability, the three points put forth by the appellants had been dealt with adequately by the trial judge, and there was no reason for appellate interference.

[4] Since the award for the dependency claim constituted only 53% of the deceased's earnings, it was deemed to be a fair amount.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu-perayu telah merayu terhadap gantirugi yang diawardkan kepada responden disebabkan kemalangan motosikal yang menyebabkan kematian suami responden. Mereka telah membangkitkan isu samada responden adalah 'isteri' si mati diawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'), dan jika sedemikian, samada beliau mempunyai hak sah untuk menuntut gantirugi sebagai penanggungan simati.

Ini adalah disebabkan fakta bahawa ianya adalah perkahwinan adat yang diakad di Singapura, yang mana tidak didaftarkan di sana mahupun di bawah s. 22(4) Akta tersebut. Oleh itu, perayu-perayu menegaskan bahawa oleh kerana perkahwinan tersebut tidak menurut peruntukan-peruntukan Akta tersebut, ianya adalah tidak sah. Walaubagaimanapun, isu utamanya adalah samada responden akan memenuhi definisi perkataan 'isteri' di bawah s. 7(2) Akta Undang-Undang Sivil 1956.

Perayu juga menegaskan bahawa tanggungan untuk kemalangan tersebut haruslah dikongsi bersama dan bukan merupakan tanggungjawab tunggal mereka. Mereka juga berhujah bahawa isu-isu keterangan yang tertentu telah diputuskan secara salah oleh hakim.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Dengan bergantung pada s. 34 Akta tersebut, perkahwinan adat antara responden dan simati adalah sah, kerana pendaftaran adalah hanya suatu formaliti. Niat sebenar Akta tersebut adalah bagi memperuntukan suatu perkahwinan bersifat monogami, yang mana adalah secara tepatnya merupakan perkahwinan itu sebenarnya.

[2] Responden adalah isteri simati di dalam lingkungan maksud s. 7(2) Akta Undang-Undang Sivil 1965, dan beliau adalah dengan itu berhak untuk menuntut bagi kehilangan penanggungan.

[3] Mengenai isu tanggungan, ketiga-tiga isu yang dikemukakan oleh perayu-perayu telah diuruskan secukupnya oleh hakim dan tidak terdapat alasan untuk mengagihkan kesalahan tersebut secara sama.

[4] Oleh kerana award tuntutan penanggungan hanya membentuk 53% dari pendapatan simati, ianya adalah dianggap sebagai satu jumlah yang adil.

[Rayuan ditolak.]

Case(s) referred to:
Chan Chin Ming & Anor v. Lim Yok Eng [1994] 3 CLJ 687 ***(refd)***
Chong Sin Sen v. Janaki Chellamuthu [1997] 2 CLJ 699 ***(refd)***
T v. O [1994] 4 CLJ 593

Legislation referred to:
Civil Law Act 1956, ss. 7(2)
Law Reform (Marriage and Divorce) Act 1976, ss. 22(4), 23, 24, 26, 27, 34, 109

For the appellants - Tan Jin Wah; M/s Tan & Tan
For the respondent - J Chandika; M/s John Ang & Jega

[Appeal from High Court, Johor Bharu; Civil Suit No: 23-214-1993]

[Editor's note: The Federal Court in Civil Appeal No. 2-10-2003(W) has overruled the decision of the Court of Appeal herein. Please see Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor [2016] 6 CLJ 18 at paras. 30-33 and Ketua Pengarah Pertubuhan Keselamatan Sosial v. Lam Kun Tai [2019] 10 CLJ 378 at para. 24(v) & (vi).]

Reported by Suresh Nathan

JUDGMENT

Haidar Mohd Noor JCA:

This appeal is against the award of damages against the appellants as defendants by the High Court at Johor Bahru arising out of a motor accident on 7 December 1992 at about 10am at 14 1/2 milestone along the stretch of Jalan Utama/Jalan Kota Tinggi/Johor Bahru road. It resulted in the death of Chong Sey Kow (deceased). Tai Sai Hong (widow), the respondent, sued on behalf of herself and her two children as plaintiff.

Quite apart from the issue of liability, the appellants raised an issue of law, that is, whether Tai Sai Hong was the 'wife' of the deceased under the Law Reform (Marriage and Divorce) Act 1976 ("the Act") and as such, had she the legal capacity to bring the action claiming for damages for herself as a dependant of the deceased. This issue was premised on the fact that the marriage between the parties was a customary marriage contracted in Singapore and it was neither registered in Singapore nor under s. 22(4) of the Act. This fact was admitted to by Tai Sai Hong, the respondent. Why the marriage was not registered in Malaysia was not clear.

Status Of The Respondent As The 'Wife' Of The Deceased

When the parties contracted the customary marriage in Singapore at the deceased brother's house as well as in Kota Tinggi, Johor in 1986, the Act was already in force with effect from 1 March 1982 and the Act obviously would be applicable to them. However, the Act does not provide the definition of 'wife'. At most, by implication, wife must be a woman who undergoes a marriage in accordance with Part III of the Act, and such marriage may be solemnised:

(a) in the office of a registrar or elsewhere (s. 23);

(b) through religious ceremony, custom or usage (s. 24);

(c) in Malaysia Embassies etc., abroad (s. 26).

Section 27 of the Act requires the registration of the marriage pursuant to the Act.

In this case as the respondent underwent a customary marriage not in accordance with s. 24 of the Act, counsel for the appellants submitted that by virtue of s. 22(4) of the Act, the purported customary marriage was not valid and cited *T v. O* [1994] 4 CLJ 593 in support thereof.

In *T v. O*, the learned judge there was concerned with the issues of the legitimacy of the child of the customary marriage and whether such marriage was void or voidable due to non-registration. It was unfortunate that s. 34 of the Act was not considered by the learned judge or may be it was not brought to his attention. Section 34 reads:

> Nothing in this Act or the rules made thereunder shall be construed to render valid or unvalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

If the learned judge in *T v. O* had the benefit of considering s. 34, the result might well be different.

In this appeal before us, the learned judge relied on s. 34 in order to overcome the difficulty of the invalidity of the customary marriage on ground of non-compliance with the provisions of the Act including non-registration of the customary marriage of the parties. He held that by virtue of s. 34 the customary marriage between the respondent and the deceased was valid and it should not be declared invalid because it was not registered. This was on the premise that registration is merely a formality and the true essence and substance of the Act as stated in the preamble is to provide for monogamous marriage and there is nothing to show that the marriage between the respondent and the deceased was not a monogamous one.

Be that as it may, what we are concerned here really is not the validity or otherwise of the customary marriage between the parties but rather whether the respondent was the 'wife' of the deceased within the meaning and contemplation of the word 'wife' in s. 7(2) of the Civil Law Act 1956.

There has been judicial interpretation of s. 7(2) but it is only confined to the class of persons who are entitled to claim loss of support in respect of a deceased person. (see *Chan Chin Ming & Anor v. Lim Yok Eng* [1994] 3 CLJ 687). However, it was brought to our attention by the counsel for the respondent of another High Court decision that considered, as in this appeal, the issue of whether a wife who underwent a customary marriage and it was not registered under the Act is a 'wife' for the purpose of a claim pursuant to s. 7(2) of the Civil Law Act 1956. It is the decision of Mohd. Ghazali, J in *Chong Sin Sen v. Janaki a/p Chellamuthu (suing as widow of Muniappa Pillai a/l Maritha Muthoo, deceased, on behalf of her self and the dependants of the deceased)* [1997] 2 CLJ 699.

The facts of the present appeal are more or less the same as the facts in *Chong Sin Sen*'s case. In his well-reasoned judgment, this is what Mohd. Ghazali J, said regarding "wife" at p. 706:

> As quite rightly submitted by counsel for the respondent, the word 'wife' is not defined in the CLA. Counsel for the appellant has argued that after the date of coming into operation of the 1976 Act, a marriage contracted in contravention of the provisions of the Act shall be void. Section 9 which is found under Pt III of the 1976 Act provides a marriage under the Act may be solemnized only by the registrar and s. 22(4) provides every marriage purported to be solemnized in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under sub-s. (3) has been delivered to the Registrar or Assistant Registrar as the case may be. Section 5(4) provides that after the date of coming into operation of the Act, no marriage under any law, religion, custom or usage may be solemnized except as provided in Pt III. On the face of it, it would seem that the customary marriage underwent by the respondent and the

deceased, as far as the 1976 Act is concerned, would be void – they had only contracted a customary marriage after the date of coming into operation of the 1976 Act and there is no evidence to show that it was solemnized pursuant to the provisions of the 1976 Act, neither has the respondent furnished a copy of the certificate of marriage issued pursuant to the Act. Since the respondent's marriage to the deceased would seem to be void pursuant to the provisions of the 1976 Act, does that preclude her from bringing an action under ss. 7 and 8 of the CLA? In other words, is the respondent a 'wife' within the contemplation of s. 7(2) of the CLA?

In my opinion, since the legislature has seen it fit not to define what is meant by a 'wife' in the CLA, and unless there be something in the context to the contrary, I would think that that word should be read as applicable to those things to which they would in their natural sense apply. I cannot find anything in the CLA which provides that the term 'wife' as found in s. 7(2) should be confined to a woman who is a party to a marriage solemnized and/or registered under any prevailing Act relating to marriages and divorce. That being the case, I would think that it is for the court to interpret that word as found in the CLA as best it may.

The learned judge in *Chong Sin Sen* then went on to consider the Married Women Act 1957 (revised in 1990 as Act 150) *vis-a-vis* the Act regarding the meaning to be attributed to the word 'wife' in s. 7(2) of the Civil Law Act 1956 at p. 708:

In the instant case, I would decline to consider the provisions of the 1976 Act which to me is a statute which proceeds on different lines and includes different provisions which deals with a different subject matter. The preamble to the 1976 Act reads:

> An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto.

I am unable to see how it ought to have any influence upon the question which I have to decide, ie whether the respondent falls within the contemplation of the word 'wife' found in s. 7(2) of the CLA. I do not think that I should speculate on what the intention of the legislature was with regard to s. 7(2), ie as to whether such a term should only be restricted to a 'married woman' who has undergone a marriage solemnized and registered in accordance with the prevailing Act relating to marriages.

What the legislature intended to be or not to be done can only be ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication. In my opinion, I do not think that the word 'wife' found in s. 7(2) of the CLA should be restricted to a woman whose marriage has been solemnized and registered pursuant to the provisions of any prevailing Act relating to marriage and

> divorce. The Married Women Act 1957 provides that a 'married woman' includes any woman who has undergone a customary marriage – to me, such a 'married woman' would fall within the contemplation of the word 'wife' as found in s. 7(2) of the CLA – and the Act also provides that she shall be capable of suing in tort and shall be entitled to all remedies and redress for all purposes. In the instant case it is my view that the respondent, having undergone a customary marriage with the deceased, is a 'wife' and hence had *locus standi* to bring this action on behalf of the deceased's estate and that being so, I dismissed the appeal with costs.

For the record, we have examined all the laws that were repealed by the Act and there is no definition of 'wife' under any of these repealed laws (see the schedule to the Act – s. 109).

We respectfully agree and adopt the reasoning and conclusion of Mohd. Ghazali, J. As in this appeal, we are similarly of the opinion that the respondent was the wife of the deceased within the contemplation of s. 7(2) of the Civil Law Act 1956. The learned judge in this case did not err in his conclusion that the respondent was entitled to claim for loss of dependancy for herself and on behalf of her three children.

Liability

The learned judge found the first appellant 100% liable for the accident. Counsel for the appellants contended that liability should be on 50%-50% basis on the evidence before the court.

It is trite that an appellate court should be slow in disturbing the finding of facts of the trial court unless it can be shown that certain finding is against the weight of the evidence or is not supported by evidence.

On this issue of liability, we need only consider three grounds put forth by the appellants if at all there are merits. They are:

(a) "G" in the sketch plan was not brake marks made by the lorry;

(b) first appellant did not encroach into the path of the deceased motorcyclist;

(c) glass splinters from the headlamp of the motorcycle marked "H" in the sketch plan were found on the first appellant's lane of the road, ie, 2.2 feet from the centre of the road.

In respect of (a), we have examined the record and the learned judge was right in his finding that "G" in the sketch plan was brake marks made by the lorry. This finding is clearly based on the testimony of the investigating officer (SP3) as well as in the sketch plan and the key. This is what SP3 said:

'G' di muka surat 11 adalah kesan brake. Ya, ianya tunjuk keseluruhan kesan brake itu.

'G' merupakan kesan brake tayar lori tetapi saya tidak pasti sebelah mana tayar lori itu.

With respect to counsel for the appellants, this piece of evidence was not even challenged in the court below. It is too late in the day for counsel to raise this issue. It is a non-issue.

In regard to (b), we are of the view that the learned judge in his judgment had adequately considered the evidence of the first appellant (SD1), and the sketch plan and key, in particular the brake 'G' when he came to a finding that the first appellant had cut corners whilst negotiating a right hand bend and held that the first appellant was definitely encroaching into the path of the motorcyclist. We see no reasons to disagree with him.

In respect of (c), according to the evidence of the investigating officer (SP3), the broken glass fragments marked 'H' were mostly found in the centre of the road. The learned judge, however, held that 'H' was not the point of collision as after the accident he found that the lorry had dragged the deceased's motorcycle forward and the glass pieces were scattered and strewn at the point. He was, in our view, entitled to come to that conclusion on the evidence before him.

Finally on the issue of credibility of the first appellant where the learned judge treated his evidence with caution for the reason that it is full of contradictions, inconsistencies and discrepancies, we are in no position to disagree with him as he would be the best person to observe the demeanour and credibility of the first appellant.

To sum up, we would say that on the issue of liability, it is essentially a question of facts and there are no compelling grounds for us to interfere.

On the issue of the award of dependency claim of RM1,250 to the respondent and her three children it only constitutes about 53% of the deceased's earnings of S$1,428 which is equivalent to RM2,345. We are of the view that it is a fair and reasonable amount.

For the reasons stated, we dismissed the appeal with costs and affirmed the order of the learned judge. The deposit to go to the respondent towards her taxed costs.